# Nos. 14-1181, 14-1224

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**UNF WEST, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board certify the following:

A. ***Parties and Amici***: UNF West, Inc., was the respondent before the National Labor Relations Board and is the petitioner/cross-respondent before the Court. Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters was the charging party before the Board. The Board's General Counsel was a party before the Board.

B. ***Rulings Under Review***: The case under review is a decision and order of the Board issued on September 3, 2014, and reported at 361 NLRB No. 42.

C. ***Related Cases***: This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

/s/ Linda Dreeben
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Dated at Washington, DC
this 30th day of March, 2015

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**THE NATIONAL LABOR RELATIONS BOARD**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF JURISDICTION

This case is before the Court on the petition of UNF West, Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Order issued against the Company. The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. §§ 151,

160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board's Decision and Order issued on September 3, 2014, and is reported at 361 NLRB No. 42.[1] It is a final order with respect to all parties. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court. The Company filed its petition on September 17, 2014, and the Board its cross-application on November 3, 2014. Both filings were timely because the Act places no time limitation on such filings.

## STATEMENT OF THE ISSUES

(1) Whether the Court should reject the Company's attempt to incorporate by reference the briefs it filed before the Board.

(2) Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by interrogating employee Edgar Acosta regarding union organizing activities, and by threatening employee Sergio Acosta, a well-known union organizer, on four separate occasions.

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[1] "A." references in this final brief are to the Deferred Appendix. "Br." references are to the Company's opening brief to this Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## RELEVANT STATUTES AND REGULATIONS

The relevant statutory provisions are contained in an addendum to this brief.

## STATEMENT OF THE CASE

In late 2011, the Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters ("the Union") began an organizing campaign seeking to represent the warehouse employees at the Company's Moreno Valley, California facility. (A. 143.) This case involves the Board's findings that the Company committed unfair labor practices both before and after a Board-conducted secret-ballot election, which the Union lost. (A. 143.) After the election, the Board's General Counsel issued a complaint based on unfair-labor-practice charges and election objections that the Union filed. (A. 143.)

After a hearing, an administrative law judge issued a decision and recommended order. The judge found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating employee Edgar Acosta regarding union organizing at the facility. (A. 145.) The judge further found that the Company threatened employee Sergio Acosta in violation of Section 8(a)(1) by warning him (i) that the Company would not negotiate or sign a contract with the Union; (ii) that all workers could lose benefits if they selected union representation; (iii) that the Company was looking for a way to fire him; and (iv)

that his working conditions would not improve unless he stopped complaining to the Union and to the Board. (A. 146.) The judge severed the election objections and remanded that case to the Regional Director. (A. 143.) After the Company filed exceptions to the judge's decision, the Board issued a Decision and Order on September 3, 2014, adopting the judge's findings and conclusions regarding the unfair labor practices and his recommended order. (A. 142.)

## I. THE BOARD'S FINDINGS OF FACT

### A. Background and Company Operations; the Union Begins an Organizing Campaign at the Company's Facility

The Company is engaged in the nonretail distribution of natural, organic, and specialty foods, and operates a warehouse facility in Moreno Valley, California. (A. 143.) There are about 259 employees at the facility, who work three different shifts. (A. 143; 52.)

In December 2011, the Union began organizing at the Moreno Valley facility, seeking to represent the warehouse workers. Sergio Acosta (Sergio), a reach lift operator who worked at the warehouse since 2007, initially contacted the Union to inquire about representation. (A. 53.) After a face-to-face meeting between Sergio, two other employees, and a union official, a union organizing committee was formed. (A. 54.) Sergio was soon "widely recognized" as the most active employee organizer. (A. 145; 55-56, 104.)

Prior to the election, an attorney trained supervisors at the warehouse on the "does and don'ts of an organizing campaign." (A. 144; 99-102.) This training cautioned supervisors against threatening, interrogating, or surveilling employees. Supervisors were also instructed not to promise employees an increase of salaries or benefits if they voted against the union, and not to solicit grievances. (A. 100.)

### B. Supervisor Jeff Popovich Listens to Employee Edgar Acosta's Conversation with a Co-Worker About the Union

Edgar Acosta (Edgar), Sergio's nephew, also worked for the Company in its Moreno Valley warehouse from April 2010 until March 2012. (A. 144; 36-37.) Along with Sergio, Edgar participated in the union campaign by passing out union authorization cards and speaking to his co-workers about the organizing campaign. (A. 145; 38.)

In February 2012, Edgar had a conversation with his friend and co-worker, Bryan Redmon,[2] in the employee break room during their lunch break. (A. 145; 39.) At the time, approximately 35-40 other workers were in the break room, but only two other employees were sitting at the same table as Edgar and Redmon. (A. 145; 47-48.) While speaking with Redmon, Edgar saw Supervisor Jeff Popovich enter and walk around the break room before he paused by the table at which Edgar and Redmon were discussing the union campaign. (A. 145; 41-42.) After

[2] The Decision and Order mistakenly spells Bryan Redmon's last name as "Redman."

the pause, Popovich immediately exited the room. (A. 145; 42.) Because Popovich did not stop at any of the other tables in the break room, Edgar suspected Popovich was eavesdropping on his conversation with Redmon about the Union. (A. 145; 49.)

### C. Supervisor Mike Cusey Interrogates Edgar About Unionizing Activities at the Facility; Edgar Is Terminated

The following day, Mike Cusey, Edgar's supervisor, summoned Edgar over the warehouse intercom to a conference in his office with Popovich. (A. 145; 42-43.) When Edgar entered, Cusey went "straight to the point." He told Edgar that he had heard "there's Union talk going around the warehouse" and asked Edgar if he "knew or have heard anybody talking or trying to bring in the Union." (A. 145; 43.) Edgar denied knowing anything about the Union. Cusey then told Edgar to report back to him if he heard anything or if he learned of other employees talking about the Union. (A. 145; 43.) Edgar told Cusey "okay" and then returned to his work. (A. 145; 43.)

About a month after his meeting with Cusey and Popovich, Edgar was terminated. (A. 144; 44.) The Company told Edgar he was terminated for productivity reasons. (A. 144; 36-37.)

### D. Supervisor Javier Oliver Tells Employee Sergio Acosta That The Company Will Not Bargain With the Union

On May 2, 2012, two weeks before the Union election, Supervisor Javier Oliver approached Sergio while he worked alone in the warehouse. (A. 146; 58.) After asking Sergio a work-related question, Oliver informed Sergio that the Company was not going to sign any contract with the Union. Oliver also told Sergio that the Company would not negotiate with the Union and that they did not "want to know anything about the Union." (A. 146; 59.) After Oliver made his remarks about the Company's position on the Union, he left without saying anything further. (A. 60.)

### E. Supervisor Javier Oliver Warns Sergio That Unionization Would Cause Employees To Lose Benefits; the Union Loses the Election

The following day, Oliver approached Sergio to speak with him about broken pallets. (A. 146; 60.) Oliver then told Sergio that employees would lose "everything" if they chose the Union as their bargaining representative, including their benefits, specifically mentioning their 401(k) and stock investment plan. (A. 146; 60-61.)

The Region conducted a representation election on May 17, 2012. Approximately 259 employees were eligible to vote in the election. (A. 143; 12.) The Union lost by a margin of 152 to 88. (A. 143; 12.) The Union filed objections

to the conduct of the election, seeking to set aside the results and conduct a new election. (A. 143; 12.)

### F. Supervisor Javier Oliver Warns Sergio that the Company Is Looking for Ways To Fire Him

Five months after the Union election, and while the Union's election objections were pending, Oliver approached Sergio at his work location in the warehouse and asked whether warehouse manager Frank Manzano had spoken to him about a potential transfer due to Sergio's shoulder injury. (A. 146; 110-11.) Sergio told Oliver that he had spoken to Manzano about a recent write-up he received but not about the transfer. (A. 146; 63.) Oliver then warned Sergio to be careful because when supervisors and managers held closed door meetings, they were looking for a way to fire him. (A. 146; 64.)

### G. Supervisor Javier Oliver Warns Sergio That His Working Conditions Will Not Improve Because of His Union Activity

About a week later, Eddie Ochoa, a lead maintenance department employee, approached Sergio and remarked that Sergio did not look well. (A.65.) Sergio explained to Ochoa that he was upset because his daughter overheard him talking with his wife about all of the problems he was having at work. (A. 146; 66.) Sergio told Ochoa that his daughter informed him that when she grew up, she would take him away from working in the warehouse for the Company. (A. 146;

66.) Ochoa sympathized with Sergio's situation and after speaking briefly about their families, Ochoa left. (A. 146; 66.)

Later that day, Oliver called Sergio into his office over the warehouse intercom system. Sergio entered Oliver's office as Ochoa was leaving. (A. 146; 66-67.) Oliver asked Sergio what was wrong. Sergio recounted the story about what his daughter had told him. (A. 146; 68.) Oliver told Sergio that the solution to his problem was to "[s]top complaining to the Labor Board and the Union." (A. 146; 68.) Sergio responded by saying that he only wanted someone to represent him. (A. 69.) To that, Oliver replied only by saying, "Well, I already gave you the solution." Sergio did not respond and returned to work. (A. 146; 69.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Hirozawa and Johnson) found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating employee Edgar Acosta regarding union organizing at the facility. (A. 142.) The Board further found that the Company violated Section 8(a)(1) by warning employee Sergio Acosta (i) that the Company would not negotiate or sign any contract with the Union; (ii) that all workers could lose benefits if they selected union representation; (iii) that management was looking for a way to fire him; and (iv) that his working conditions would not improve unless he stopped complaining to the Union and to the Board. (A. 142.)

To remedy the violations, the Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. (A. 142.) Affirmatively, the Order requires the Company to post a remedial notice. (A. 142.)

## SUMMARY OF THE ARGUMENT

Throughout its brief, the Company invites the Court to incorporate two briefs it filed with the Board (Exceptions Brief and Reply Brief) and to consider the arguments, authorities, and record citations contained in those documents. The Company's attempted incorporation of these two briefs is improper because the Exceptions Brief is not part of the record before the Court. Further, incorporation of briefs runs afoul of the requirements set forth in Federal Rule of Appellate Procedure 28(a)(8)(A), which requires that a brief "must contain" a party's argument as well as any citations and legal authorities upon which that party relies. As such, the Court should strike the nonrecord references and consider the arguments that rely upon the previously filed briefs as inadequately briefed and therefore waived.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act when Supervisor Cusey coercively interrogated employee Edgar Acosta. The credited evidence shows that Cusey and Popovich,

who both had positions of authority over Edgar, summoned him from the work floor to a closed door meeting in Cusey's office. Cusey, offering no assurances against reprisal, asked Edgar whether he knew of or heard any co-workers talking about the Union. Edgar denied any involvement with or knowledge about the Union. The Board properly found that these circumstances supported a finding of unlawful interrogation. In contending that the Board erred in finding the interrogation unlawful, the Company's specific challenges are only to the judge's credibility determinations, which carefully resolve conflicts in testimony and were reviewed and adopted by the Board. Despite its efforts, the Company has failed to provide the Court with any basis to disturb those determinations.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening Sergio Acosta—a prominent union supporter—on four separate occasions. Before the election, Supervisor Oliver issued two "classic threats" to Sergio. First, just two weeks before the election, Oliver informed Sergio that the Company would not negotiate or sign a contract with the Union. Oliver then delivered a second threat to Sergio, warning him that employees would lose benefits, including their 401(k) benefit, if they voted for the Union. Given Oliver's position of authority, the remark being delivered close in time to the election, and the prior unlawful interrogation of

Edgar, Sergio could reasonably view Oliver's statements as threatening that selecting the Union would be futile and would result in the loss of benefits.

After the election, management continued to harbor animus against Sergio's union activity, issuing another "double-barreled warning" to Sergio. Oliver first told Sergio that the Company was looking for a way to fire him. Then, a week later, Oliver told Sergio that the solution to his work problems was to stop complaining to the Union and the Board. Given the context within which Oliver made his statements – while election objections were pending and after he had already twice threatened Sergio, the Board reasonably found that Oliver's statements—viewed objectively—threatened both job loss and worsening work conditions unless Sergio stopped his union activity. In disputing the Board's findings, the Company relies on Oliver's discredited version of events, but again fails to provide any basis for the Court to disturb the Board's credibility determinations.

## STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). The Board's factual findings and its application of the law to particular facts are conclusive if supported by substantial evidence on the record as a whole. *Id.* Because substantial evidence means "such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion," this Court will grant a petition for review "'only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.'" *Palace Sports & Entm't, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (quoting *Resort Nursing Home v. NLRB*, 389 F.3d 1262, 1270 (D.C. Cir. 2004). Put differently, the Court must decide "whether on th[e] record it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 366-67 (1998).

Moreover, this Court gives great deference to an administrative law judge's credibility determinations, as adopted by the Board. *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994). Under the well-known standard, the Court will not disturb such credibility determinations unless they are "hopelessly incredible," "self-contradictory," or "patently unreasonable." *NLRB v. Capital Cleaning Contractors*, 147 F.3d 999, 1004 (D.C. Cir. 1998); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996). As a result, credibility determinations made by the judge, and adopted by the Board, are ordinarily not judicially second-guessed. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337-38 (D.C. Cir. 2003) ("Decisions regarding witness credibility and demeanor are entitled to great deference, as long as relevant factors are considered and the resolutions are explained.")

## ARGUMENT

The Board properly found that the Company unlawfully responded to the Union's campaign by interrogating employee Edgar Acosta and by threatening well-known union supporter Sergio Acosta on multiple occasions. The Company raises no meritorious challenge to these findings. Instead, as discussed below (pp. 14-21), the Company repeatedly asks the Court to refer to arguments raised in previously filed briefs—a request that this Court should deny. In addition to summarily referencing arguments raised below, the Company also claims that its defenses against the unfair-labor-practice findings are more than simple credibility arguments but are instead a challenge to the Board's failure to consider the record as a whole. A review of the Company's specific contentions, however, reveals that the Company raises challenges only to the Board's credibility determinations and essentially seeks to have the Court "retry the evidence," which is "not for [a] court to do." *See Vico Prods. Co. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003).

### I. THE COURT SHOULD REJECT THE COMPANY'S ATTEMPT TO INCORPORATE BY REFERENCE THE BRIEFS IT FILED BEFORE THE BOARD

Throughout its brief, the Company repeatedly entreats the Court to refer to two briefs it filed with the Board (Brief in Support of Its Exceptions and Reply Brief in Support of Its Exceptions, "Exceptions Brief" and "Reply Brief," respectively), and to consider the arguments, "authorities, and record citations"

contained in those documents. (Br. 23.) Specifically, the Company's brief relies on its Exceptions Brief for the following arguments:

- The Board relied upon speculation and "inference upon inference" in finding that Supervisor Cusey coercively interrogated Edgar Acosta. (Br. 23);
- The judge erroneously relied on the Company's failure to call Cusey as a witness. (Br. 23);
- The judge failed to consider the record as a whole and applied an arbitrary double standard when assessing Edgar Acosta's credibility. (Br. 25);
- The Board failed to consider the record as a whole in finding Supervisor Cusey unlawfully interrogated Edgar Acosta. (Br. 26);
- Sergio Acosta was not a reliable witness. (Br. 28); and
- The Board's finding that Supervisor Oliver Martinez would threaten a known union supporter "defies common sense." (Br. 31).

The Company cites to both its Exceptions Brief and Reply Brief for the following arguments:

- The Board erred in relying solely on Edgar Acosta's testimony to establish the unlawful interrogation. (Br. 20);
- The judge expected the General Counsel to recall union witness Martinez, who would have contradicted Sergio Acosta's testimony. (Br. 28, 29);
- Many witnesses contradicted Sergio Acosta's testimony. (Br. 28, 29);
- The Board failed to consider the record as whole in finding that the Company unlawfully threatened Sergio Acosta. (Br. 28) and;
- The Board erred in not considering the General Counsel's failure to call corroborating witnesses. (Br. 30).

The Company's attempted "incorporation" of these two briefs is impermissible for two reasons. First, the Company cannot rely on its Exceptions Brief because it is nonrecord material.[3] Second, the attempted incorporation runs afoul of the requirements set forth in Federal Rule of Appellate Procedure 28(a)(8)(A). The Court should strike the nonrecord references and consider the summarily raised arguments waived. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 807 n.29 (D.C. Cir. 1998) (granting motion to strike documents attached to brief because they were not part of the record); *Dunkin' Donuts Mid-Atlantic Distr. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (refusing to consider summarily raised arguments).

### A. The Court should strike all arguments relying upon the Exceptions Brief because it is nonrecord material

The Court cannot refer to the Exceptions Brief because it is not part of the record. Federal Rule of Appellate Procedure 16(a) provides that the record on review of a Board order consists only of the order itself, "any findings or report on which it is based," and "the pleadings, evidence, and other parts of the proceedings before the [Board]." Fed. R. App. P. 16(a). Further, the Notes of the Advisory Committee on Appellate Rules state with respect to Rule 16(a): "There is no

[3] Contemporaneous with the filing of this brief, the Board has filed a motion to strike all arguments and references purporting to be based on the Company's inappropriate attempts to incorporate by reference the nonrecord material from its opening brief.

distinction between the record compiled in the agency proceeding and the record on review; they are the same." The Board's Rules and Regulations define the record in an unfair labor practice proceeding as including the charge, complaint, answer, and any amendments; motions, rulings, and orders; the notice and transcript of hearing, stipulations, exhibits, documentary evidence, and depositions; and the administrative law judge's opinion, and exceptions to the decision and answering briefs. 29 C.F.R. § 102.45(b). The Exceptions Brief is not part of the record before the Court, and this Court should strike the arguments listed above that rely upon that brief. *See Lewis v. Frayne*, No.14-938, 2014 WL 7100248, at *2 n.1 (2d Cir. Dec. 16, 2014) (material not included in the record on appeal will not be considered); *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1042 (9th Cir. 2013) (granting motion to strike extra-record evidence referenced in brief). *See also Appalachian Power Co.*, 135 F.3d at 807 n.29 (granting motion to strike documents attached to brief because they were not part of the record); *NLRB v. Winn-Dixie Stores, Inc.*, 410 F.2d 1119, 1121 n.1 (5th Cir. 1969) (granting motion to strike documents not introduced into evidence from the employer's brief).

### B. The Company's failure to adequately brief its arguments renders those arguments waived

The Court should also reject the Company's entreaty to decipher the arguments raised in the Exceptions Brief and Reply Brief and should deem these summarily raised arguments waived. Under Rule 28(a)(8)(A), the Company's brief must contain its contentions "with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on." As this Court has observed, "appellate courts do not sit as self directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, failure to enforce [Rule 28(a)(8)(A)] will ultimately deprive [this Court] in substantial measure of that assistance of counsel which the system assumes – a deficiency that [this Court] can perhaps supply by other means, but not without altering the character of [the] institution." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). As such, this Court has repeatedly refused to consider passing references to unsupported claims, and it has consistently ruled that an opening brief "must contain" citations to the authorities and record that support the petitioner's arguments. *See Dunkin' Donuts Mid-Atlantic Distr. Ctr., Inc.*, 363 F.3d at 441 (citing cases).

An attempt to incorporate by reference prior briefs filed in the underlying proceeding is contrary to the requirements set forth in Rule 28(a)(8)(A). *See Ahern v. Jackson Hosp. Corp.*, 351 F.3d 226, 240 (6th Cir. 2003) ("The incorporation by

reference of arguments . . . does not comply with the Federal Rules of Appellate procedure and therefore such arguments are waived."). By repeatedly referring to arguments made before the Board in its Exceptions Brief and Reply Brief, the Company is "exhorting this panel to conduct a complete review of its [prior] brief[s]." *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004). In other words, rather than providing the Court with all necessary arguments and citations that Rule 28(a)(8)(A) requires, the Company invites the Court "'to unearth its arguments lodged . . . in the [] [briefs], leaving it to [the Court] to skip over repetitive material, to recognize and disregard any arguments that are not irrelevant, and to harmonize the arguments' it has made at various stages of litigation." *Id.* (quoting *Northland Ins. Co. v. Stewart Title Guaranty Co.*, 327 F.3d 448, 452 (6th Cir. 2003). Mere citation to previously filed documents does not meet the requirements set forth in Rule 28(a)(8)(A), nor does it make the arguments accessible to the Court. In addition to flouting the Federal Rules of Appellate Procedure, incorporation by reference is a "pointless imposition of the court's time." *Northland Ins. Co.*, 327 F.3d at 452. The Court should therefore deem the arguments which rely on the previously filed briefs waived. *See New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (unchallenged issues are waived on appeal). *See also Dunkin' Donuts Mid-Atl. Distrib. Ctr.*, 363 F.3d at 441 (under Federal Rules of Appellate Procedure,

opening brief "'must contain'" citations to the authorities and record that support the party's arguments); *Carducci*, 714 F.2d at 177 (the Court will not address "an asserted but unanalyzed . . . claim").

In addition to skirting the requirement that a litigant fully brief arguments before the Court, the Company's attempt to affix two additional briefs to their opening brief "makes a mockery of [the] rules governing page limitations and length." *Four Seasons Hotels & Resorts*, 377 F.3d at 1167 n.4. *See also DeSilva v. DiLeonardi*, 181 F.3d 865, 866-67 (7th Cir. 1999) ("[A]doption by reference amounts to a self-help increase in the length of the appellate brief."). The Company's brief must make all arguments accessible to the Court, and not "ask them to play archaeologist with the record." *Id.* *See also Clifton Power Corp. v. FERC*, 294 F.3d 108 (D.C. Cir. 2002) (the Court will not consider arguments not presented in the briefs); *Rhode Island Dept. of Env't Mgmt. v. United States*, 286 F.3d 27, n.7 (1st Cir. 2002) (parties warned not to adopt by reference arguments made elsewhere).

In sum, the Court should reject the Company's inappropriate attempt to incorporate by reference the briefs it filed before the Board. The references to the Exceptions Brief should be stricken as improperly relying upon nonrecord material, and the Court should consider waived the summarily raised arguments

that rely on the briefs, as running afoul of the Federal Rules of Appellate Procedure.

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEE EDGAR ACOSTA AND BY REPEATEDLY THREATENING EMPLOYEE SERGIO ACOSTA

### A. An Employer Violates Section 8(a)(1) If Its Conduct Reasonably Tends To Coerce or Intimidate Employees in Exercising Their Section 7 Rights

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7." The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Under this objective test, proof of animus or actual coercion is unnecessary. *Avecor*, 931 F.2d at 931-32; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

An employer's statements "must be judged by their likely import to [the] employees." *C&W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978). *Accord Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (assessing the legality of employer statements based on whether employees would "reasonably perceive" them as threats). The critical inquiry, then, is what an employee would reasonably have inferred from the employer's statements or actions when viewed in context. *See, e.g., Tasty Baking Co.*, 254 F.3d at 124-25 (statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context). "Remarks that may not appear coercive when considered in isolation may take on a different meaning when evaluated with respect to the totality of the circumstances." *NLRB v. Kaiser Agric. Chem.*, 473 F.2d 374, 381 (5th Cir. 1973).

When evaluating an employer's statement, the Board considers "the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). This Court recognizes "'the Board's competence . . . to judge the impact of utterances made in the context of the employer-employee relationship.'" *Progressive Elec.*, 453 F.3d at 544 (quoting *Gissel*, 395 U.S. at 620.)

As we discuss below, the Board, applying the above principles, properly found that the Company violated the Section 8(a)(1) of the Act by interrogating Edgar and by repeatedly threatening Sergio.

### B. The Company Violated Section 8(a)(1) by Interrogating Employee Edgar Acosta About His Knowledge of the Union's Organizing Campaign

It is well settled that an employer violates Section 8(a)(1) of the Act by coercively interrogating employees about their union support and activities. *See Avecor*, 931 F.2d at 931; *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987). In determining whether an employer's interrogation has a reasonable tendency to coerce, the Board appropriately considers the totality of the circumstances. *See Rossmore House*, 269 NLRB 1176, 1178 & n.20 (1984), *aff'd sub nom., Hotel Employees & Rest. Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Southwire Co.*, 820 F.2d at 456. Factors that may be considered in the totality of the circumstances include: the background of the employer's hostility to unionization; the nature of the information sought; the identity of the questioner; the place, timing, and method of the interrogation; the truthfulness of the reply; whether the employee is an open union supporter; and whether the questioner gave the employee assurances against reprisals. *See Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835-36 (D.C. Cir. 1998) (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)); *see also Midwest*

*Reg'l Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 564 F.2d 434, 443 (D.C. Cir. 1977). This Court has noted that these "*Bourne* factors" are not prerequisites to a finding of coercive questioning, "but rather useful indicia that serve as a starting point for assessing the totality of the circumstances." *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

**1. Supervisor Cusey coercively interrogated employee Edgar Acosta**

The Board reasonably found that the facts established on the credited testimony provide "strong evidence" that "overwhelmingly support[s]" the finding that Cusey coercively interrogated Edgar. (A. 145.) Specifically, as shown at pp. 5-6, the credited facts show that after summoning Edgar over a warehouse intercom system, Supervisor Mike Cusey questioned Edgar Acosta in his office behind closed doors and in the presence of Supervisor Jeff Popovich about Edgar's knowledge of, and involvement in, the union's organizing campaign. When Edgar denied knowing anything about the campaign, Cusey then asked Edgar to report back and let Cusey know if Edgar heard anything in the future about other employees' union activities.

On that credited evidence, the Board reasonably determined (A. 145) that a majority of the *Bourne* factors weight in favor of finding unlawful interrogation. As to the nature of the information, the Company sought information not only about the Edgar's union organizing activity, but also about all of the warehouse

employees. The fact that the questioning sought information about other employees and the organizing effort in general supports the inference that the questioning is coercive. As this Court has noted, "any attempt by an employer to ascertain employees' views and sympathies regarding unionization generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge upon his Section 7 rights." *Allegheny Ludlam Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997); *see also W&M Props. of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2007) (questioning about union sympathies has a "tendency to coerce"); *NLRB v. Rubin*, 424 F.2d 748, 750-51 (2d Cir. 1970) (questioning employees about their and their coworkers' union activities is coercive interrogation).

Cusey's and Popovich's positions in the Company hierarchy further support the Board's finding that the questioning was coercive. The questioner, Cusey, was second in command only after the warehouse manager. In addition, Cusey questioned Edgar in the presence of another warehouse supervisor, Popovich. *See, e.g., Midwest Reg. Joint Bd.*, 564 F.2d at 443 (questioning by someone in the "management hierarchy" evidence of coerciveness); *K-Mart Corp.*, 336 NLRB 455, 469 (2001) (questioning by general manager, a high ranking official onsite, evidence of coerciveness); *Ingram Book Co., Div. of Ingram Indus., Inc.*, 315

NLRB 515, 516 (1994) (questioning by vice president of human resources evidence of coerciveness).

The coercive nature of Cusey's questioning is further shown by Cusey and Popovich holding the conversation with Edgar alone and behind closed doors in a private office (A. 145; 42-43), a locus of managerial authority. *See, e.g.*, *Timsco*, 819 F.2d at 1178 (interrogation coercive when manager questioned employee about union in manager's office with door closed). In addition, not only did the questioning take place in a boss's office, Cusey summoning Edgar via loudspeaker created an atmosphere of unnatural formality. *See Metro Transport, LLC*, 351 NLRB 657, 689 (2007) (summoning of employee to the supervisor's office is evidence of coercion). Indeed, as the judge noted, the loudspeaker summons was "presumably overheard throughout the working floor." (A. 145.)

Edgar's reply to Cusey's questions further supports the Board's unlawful interrogation finding. As the Board observed (A. 145), Edgar had not been open about his union sympathies. Cusey's questions, therefore, sought new information not only about Edgar's personal interest in the Union but also information about other employees' union activities. Tellingly, Edgar gave brief, evasive answers, demonstrating his discomfort with the probing questions. *See Perdue Farms*, 144 F.3d at 835-36 (employer, who did not know employees' union sympathies, coercively interrogated employees with questions seeking information about

individual union activities); *Midwest Reg'l Joint Bd. Amalgamated Clothing Workers of Am.,* 564 F.2d at 443 (lack of employee truthfulness in replies to questions is evidence of coercion).

In addition, Cusey's failure to convey any legitimate purpose of his questioning or offer assurances against retribution is relevant evidence of coercion. *Norton Audubon Hosp.*, 338 NLRB 320, 321 n.6 (2002) ("the absence of assurances that the questions did not have to be answered or that reprisals would not take place is a factor tending to establish the existence of coercive circumstances"); *Perdue Farms*, 144 F.3d at 835-36 (same); *Midwest Reg'l Joint Bd. Amalgamated Clothing Workers of Am.*, 564 F.2d at 443 (same).

Finally, the Board reasonably found (A. 145) that the history of the employer's hostility towards or discrimination against union supporters further supported the conclusion that the interrogation of Edgar was coercive. As the judge noted (A. 145), the subsequent hostility that the Company demonstrated toward employee union activity gave the General Counsel "the edge" with respect to this *Bourne* factor. However, even if this factor did not support a finding of coerciveness, "the absence of any one of the *Bourne* indicia of coercive interrogation" does not "exonerate the employer." *See Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 492 (2d Cir. 1975).

In arguing that no interrogation occurred, the Company claims (Br. 7-8) that it is "pure speculation" that either Cusey or Popovich even knew about the Union when they met with Edgar. This argument asks the Court to embrace Popovich's discredited testimony (*see* below pp. 33-34) that he did not overhear Edgar's break room conversation about the Union and that neither he nor Cusey questioned Edgar about the Union. The credited evidence, however, demonstrates that Popovich lingered noticeably long at Edgar and Redmon's table in the employee break room while they were discussing unionization. (A. 145; 41-42.) The very next day, Cusey and Popovich called Edgar into the office and questioned him about union activity at the warehouse. (A. 42-43.) Thus the Board reasonably inferred that Popovich overheard the conversation between Edgar and Redmon.

In any event, whether Popovich overheard the conversation is just one part of the judge's multi-faceted analysis of the coercive interrogation violation. While Edgar was uncertain about whether Popovich listened to the break room conversation, he was quite certain that Cusey used the office intercom to call him to a closed-door meeting in Cusey's office where Cusey asked Edgar about his and his co-workers' union activities. (A. 42-43.) Considering these facts, about which Edgar testified with certainty, the judge properly applied the *Bourne* factors and found they weighed in favor of finding a violation, and the Company raises no meritorious argument that the judge erred in that analysis.

### 2. The Company fails to meet its heavy burden in seeking to overturn the Board's credibility determinations

Rather than challenge the Board's application of the *Bourne* factors, or its assessment of the totality of the circumstances, the Company objects only to the Board's adoption of the judge's credibility determinations—a challenge that lacks merit. The Company contends (Br. 14, 27) that its argument against the Board's unlawful interrogation finding is not merely a "simple challenge" to the judge's credibility determinations, as the Board found (A. 142 n.1), but is instead a challenge to the Board's failure to consider the record as a whole. Apart from that sweeping generalization, the specifics of the Company's arguments boil down to nothing more than an objection to the judge's decision to credit Edgar over Popovich. For instance, the Company complains (Br. 10, 23-26) that the judge did not consider Edgar's combative demeanor and inconsistent testimony, failed to assess Popovich's credibility, improperly considered Cusey's absence from the hearing, and unfairly applied a double standard in rendering his credibility resolutions.

The Company faces an uphill battle with such arguments. As this Court has long held, the credibility determinations of an administrative law judge, when adopted by the Board, "may not be overturned by the reviewing court absent the most extraordinary circumstances such as utter disregard for sworn testimony or

the acceptance of testimony which is on its face incredible." *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007). Therefore, in order to overturn the judge's credibility determinations here, the Company must show not only that the credited testimony "carries . . . its own death wound," but also that the "discredited evidence . . . carries its own irrefutable truth." *United Auto Workers v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971). In fact, deference to the Board's findings is particularly appropriate where, as here, the "record is fraught with conflicting testimony and essential credibility determinations have been made." *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985); *accord Federated Logistics v. NLRB*, 400 F.3d 920, 925 (D.C. Cir. 2005) (accepting the Board's resolution of conflicting testimony). The Company's arguments simply do not come close to meeting that high standard.

**a. The judge properly considered Edgar's "impressive" demeanor**

The Company claims (Br. 25) that Edgar was "combative" and "evasive." The judge, however, properly found otherwise. In finding Edgar to be credible, the judge expressly considered Edgar's "impressive demeanor" and articulated a carefully considered demeanor-based credibility resolution to support his decision. (A. 144.) Specifically, the judge found Edgar's "manner and tone" to be "unusually restrained" and "without exaggeration." (A. 144.) Additionally, the judge found that Edgar "exhibited little outward hostility over the fact that he had

been discharged by [the Company], did not appear argumentative while testifying, gave every indication that he listened carefully to the questions asked, and then answered courteously and forthrightly." (A. 144.) Because the Board's policy is to "attach great weight to a [judge's] credibility findings insofar as they are based on demeanor," the Company's effort to disrupt the judge's reasoned and demeanor based credibility determinations is, accordingly, unsupportable. *See also Capital Cleaning Contractors, Inc.*, 147 F.3d at 1006 (judge's credibility findings were based on demeanor and "apparent truthfulness" and thus, not hopelessly incredible); *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (deference is owed to "judge's credibility determinations because [the judge] 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records'") (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)).

Ignoring the judge's well-reasoned decision to credit Edgar over Popovich, the Company contends (Br. 21-22) that the judge failed to make all "necessary credibility resolutions" and that a remand is therefore warranted. However, the cases upon which the Company relies to support its argument are inapposite. In those cases, unlike here, the trier of fact's credibility determinations were either unexplained or based on improper assumptions. Thus, in *PPG Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008), the Board found that judge's credibility

resolution—based solely on the fact that the credited witness was a current employee—did not consider demeanor or contrary document evidence. Likewise, in *Fortuna Enter.*, 354 NLRB 202, 203 (2009), the Board refused to adopt the judge's unexplained credibility resolutions, and in *Saigon Gourmet Rest., Inc.*, 353 NLRB 1063, 1064 (2009), the Board remanded threat allegations because the judge failed to make any credibility findings. No such circumstances are present in this case, where the judge carefully articulated his demeanor-based credibility resolution, and the Board adopted that determination on review.

**b. The Company shows only minor inconsistencies in Edgar's testimony**

There is no merit to the Company's argument (Br. 10, 25) that Edgar's testimony is not worthy of credence because it contradicted his affidavit. In his affidavit, Edgar stated that the union organizing campaign started in January 2012; in his testimony, Edgar stated the campaign started in December 2011. (A. 45.) The date the employees began organizing, however, is of little probative value to determining whether Cusey coercively interrogated Edgar in February 2012. *See Angstadt v. FAA*, 348 F. App'x. 589, *1 (D.C. Cir. 2009) ("minor inconsistencies" regarding dates present "no reason to disturb the ALJ's credibility findings"); *Capital Cleaning Contractors*, 147 F.3d at 1006 (the Court will not overturn credibility determinations based on "certain inconsistencies and minor contradictions" in testimony about "matters other than the relevant question");

*Hinkle Metal Supply & United Steelworkers of Am.*, 305 NLRB 522, 522 (1991) (affirming administrative law judge's credibility determination even though dates employee testified to were inconsistent). Thus, the Company's effort to invoke this minor discrepancy on a matter irrelevant to the interrogation as a basis for overturning the judge's credibility determination is far from convincing.

**c. The judge implicitly discredited Popovich**

The Company further argues (Br. 21) that the Board's credibility determinations should be reversed because the judge failed to assess Popovich's credibility. The Board properly rejected that argument. As the Board explained, "[b]y expressly crediting [Edgar's] testimony, which was contrary to Popovich's, the judge discredited Popovich and resolved the conflict in testimony." (A. 142 n.1.) It is "well established that explicit credibility resolutions are unnecessary where a judge has implicitly resolved conflicts in the testimony." *Amber Foods, Inc.*, 338 NLRB 712, 713 n.7 (2002). *See also NLRB v. Katz's Delicatessen*, 80 F.3d 755, 765 (2d Cir. 1996) ("implicit credibility determinations are appropriate where [a judge's] treatment of the evidence is supported by the record as a whole"); *Abbey's Transp. Services, Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (finding that administrative law judge "obviously discredited" a witness where he did not do so explicitly); *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331 (7th Cir. 1978) (administrative law judge implicitly resolved conflicts in the testimony by

crediting General Counsel witnesses); *Ward v. NLRB*, 462 F.2d 8, 11 (5th Cir. 1972) (implicit credibility determinations are proper). Thus the Company errs in contending that the judge did not consider Popovich's version of events—that version was considered and impliedly rejected in favor of Edgar's "honest rendition" of the facts surrounding the unlawful interrogation. (A. 144.)

**d. The judge properly considered the Company's failure to have Cusey testify**

The judge also properly weighed Edgar's "impressive demeanor" against the Company's "failure to call or adequately explain [Cusey's] absence." (A. 144.) A judge may properly consider a party's failure to call an identified potentially corroborating witness as a factor in weighing evidence and determining whether a violation occurred. *C&S Distributors, Inc.*, 321 NLRB 404 (1996) (citing *Queen of Valley Hosp.*, 316 NLRB 721 n.1 (1995)). As the judge noted (A. 144), Cusey was a "primary witness," who could testify on the basis of personal knowledge to what occurred when Cusey and Popovich met with Edgar. Cusey's absence is even more striking since the Company was able to produce Popovich, the other supervisor in the room when the interrogation occurred. And, as the judge also noted, although Cusey no longer worked for the Company at the time of the hearing, the Company was able to produce another formerly employed supervisor to testify as to another issue. (A. 144 n.3.) As such, the judge properly determined

(A. 144) that the Company's failure to "even appris[e] [the judge] of the efforts made to secure" Cusey's testimony "seriously impair[ed]" the Company's case.

In a last-ditch effort to dodge the Board's reasoned credibility determinations, the Company argues (Br.13; 24) that the judge used an impermissible "double standard" when he credited Edgar's version of events. The Company specifically complains that the judge credited Edgar even though the General Counsel did not call Bryan Redmon to corroborate his testimony, but then discredited Popovich in part because the Company did not call Cusey to corroborate his testimony. This argument, however, ignores the fact that Redmon was not in the room with Cusey, Popovich, and Edgar. As a result, he would have been unable to provide corroborative testimony regarding anything that happened in Cusey's office. In contrast, Cusey was not only present during the interrogation, he was the interrogator. As such, his testimony would have been relevant to determining not only whether he met with Edgar, but also what he said during the meeting.

Thus, in crediting Edgar over Popovich, the judge properly compared Edgar's demeanor against the Company's weak countering evidence. The Company falls far short of showing that the Board's credibility determinations here "are hopelessly incredible, self contradictory, or patently unsupportable." *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (internal quotation

marks omitted). In contrast, the Board's finding of the unlawful interrogation is firmly rooted in the credited evidence and, therefore, should be upheld.

### C. The Company Violated Section 8(a)(1) by Threatening Employee Sergio Acosta

Substantial evidence supports the Board's findings that the Company unlawfully threatened Sergio Acosta on four separate occasions. Two of these threats—futility of selecting union representation and loss of benefits—were the type of "classic threats" that the Board finds unlawful. The other two coercive statements—threatening discharge and urging Sergio to stop complaining to the Board and to the Union—were unlawful "double-barreled warning[s]." (A. 146.) Following settled law, the Board reasonably found that all four threats violated Section 8(a)(1) of the Act. In challenging these findings, the Company again raises only meritless challenges to the Board's credibility determinations.

#### 1. The Company threatened Sergio that union representation would be futile because the Company would not negotiate with the Union

It is well settled that comments that management will not negotiate with a union convey a message that voting for the union would be futile and are therefore unlawful threats. *See Trump Marina Assoc., LLC*, 355 NLRB 1277 (2010) (incorporating 353 NLRB 921 (2009) (comments to employees that management would not negotiate violates Section 8(a)(1) by conveying message that voting for the union is futile), *enforced*, 445 F. App'x 362 (D.C. Cir. 2011); *Garvey Marine,*

*Inc.*, 328 NLRB 991, 1010 (1999) (employer's categorical statement that it would not negotiate with the union if it became the designated bargaining agent was unlawful threat of futility), *enforced on other grounds*, 245 F.3d 819 (D.C. Cir. 2001). Such threats not to bargain are "patently coercive," *Garvey Marine*, 328 NLRB at 1010, because they admonish employees that they would exercise their Section 7 rights in vain as a collective-bargaining agreement will never be obtained. *See Equip. Trucking Co.*, 336 NLRB 277, 283 (2001) (citing *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992)). *Accord Federated Logistics & Operators*, 400 F.3d at 925 (unlawful threats that selecting the union would be futile).

Substantial evidence supports the Board's finding that on May 2, Oliver delivered a "classic threat" of futility to Sergio, telling him that the Company would not negotiate or sign any contract with the Union and that the Company did not "want to know anything about the Union." (A. 146; 59.) By telling Sergio that the Company would not negotiate with the Union, "Oliver's conduct sought to persuade Sergio that it would be futile for employees to select a union." (A. 146.) *See Taylor Chair Co.*, 292 NLRB 658, 662 (1989) (a statement that an employer would never sign a contract with the union is unlawful). Notably, the impact of Oliver's threats was enhanced by his delivering it close in time to the election. As the Board properly concluded, "[t]elling employees that the employer will not

honor its statutory obligation to bargain if the employees choose to unionize interferes with the Section 7 right of employees to bargain through a chosen representative." (A. 146.) *See Equip. Trucking Co.*, 336 NLRB at 283 (employer unlawfully threatened futility when it told employees that it would "never sign a contract").

### 2. The Company threatened Sergio that employees would lose benefits if they selected union representation

It is well settled that employer statements threatening to penalize employees if they choose union representation violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *Avecor*, 931 F.2d at 931 (citing *Southwire Co. v. NLRB*, 820 F.2d 453, 457 (D.C. Cir. 1987)). An employer must refrain from any coercive "threat of reprisal," and any prediction as to the consequences of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel Packing Co.*, 395 U.S. at 618-20. *See also Southwest Reg'l Joint Bd. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970) (threat of taking away benefits unlawful); *V&S ProGalv v. NLRB*, 168 F.3d 270, 279 (6th Cir. 1999) (same).

On May 3, Oliver delivered a second "classic threat" to Sergio when he told Sergio that if employees voted for the union, they would lose not only their 401(k) benefit, but they would also lose "everything." (A. 146; 61.) The Board

reasonably found (A. 146) that Oliver's statement unequivocally threatened Sergio with adverse consequences if the employees selected the Union as their bargaining representative. As a result, Oliver's statement was coercive and unlawful under the Act. *See Southwire Co.*, 820 F.2d at 457 (threat that if the union won the election, the company would lower wages and employees would lose benefits is unlawful); *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 466 (2001) (threats that employees would lose profit sharing, holiday pay, and vacation if they selected a union found unlawful); *Taylor Chair Co.*, 292 NLRB at 662 (threat that engaging in protected Section 7 activity may place existing benefits in jeopardy is unlawful).

### 3. The Company threatened Sergio that management was looking for ways to fire him

An employer violates Section 8(a)(1) of the Act by threatening that union activity will result in the loss of a job. *Amalgamated Clothing Workers v. NLRB*, 420 F.2d 1296, 1299 (D.C. Cir. 1969); *Tellepsen Pipeline Services Co. v. NLRB*, 320 F.3d 554, 561-62 (5th Cir. 2003). Such threats "serve as an insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood." *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

Substantial evidence supports the Board's finding that on October 12, while the Union's election objections were pending, Oliver gave Sergio the first of a "double barreled warning." (A. 146.) That day, Oliver approached Sergio at his

work location to discuss a possible transfer due to Sergio's work-related shoulder injury. (A. 146; 63.) After discussing the transfer, Oliver then warned Sergio to "be careful" because whenever the supervisors and managers are behind closed doors, "they were looking for ways to fire" Sergio. (A. 146; 64.)

The Board reasonably concluded (A. 146) that Oliver's statement to Sergio amounted to an unlawful threat. The judge noted (A. 146) that the statement was "arguably ambiguous" only if it was "stripped of all context." However, the context within which the statement occurred lessened any ambiguity. Oliver had already twice threatened Sergio—a "well known" union supporter—telling him that the Company would not negotiate with the Union and that union representation would result in a benefit loss. *See TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 420 (5th Cir. 1981) ("When a close question exists, 'the presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks.'") (quoting *Coach & Equip. Sales Corp.*, 228 NLRB 440, 441 (1977)). In addition, Sergio had recently participated as an election observer for the Union. (A.145-46; 70-71.) Thus, contrary to the Company's assertion (Br. 32), Oliver's statement was not merely an "off the cuff observation," but instead threatened that Sergio's very livelihood was in jeopardy. *Jupiter Med. Ctr. Pavilion*, 346 NLRB 650, 651 (2006) (employer violated Section 8(a)(1) by making implied threat of

discharge to employee). *See also Bridgeway Oldsmobile*, 281 NLRB 1246, 1256 (1986) (statements to employees that union activity is not compatible with continued employment constitute unlawful threats), *modified on other grounds*, 290 NLRB 824 (1988).

#### 4. The Company unlawfully warned Sergio to stop complaining to the Board and the Union

As explained above, a statement violates the Act if it reasonably tends to coerce employees in the exercise of their Section 7 rights. A threat need not predict that specific action will be taken in reprisal for engaging in union activity; unspecified reprisals can also violate the Act. *Chem. Solvents, Inc.*, 331 NLRB 706, 718 (2000). Further, in determining whether a statement by an employer violates Section 8(a)(1), the Board considers the totality of the relevant circumstances, including the presence of other contemporaneous unfair labor practices. *See TRW-United Greenfield Div.*, 637 F.2d at 420 ("The presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks."); *see also Ctr. Serv. Sys. Div.*, 345 NLRB 729, 731 (2005); *Contempora Fabrics*, 344 NLRB 851 (2005); *Saginaw Control & Eng'g*, 339 NLRB 541, 541 (2003). Moreover, an employer cannot interfere with an employee's right to use the Board's processes. *See Braun Elec. Co.*, 324 NLRB 1, 3(1997) (Section 7 of the

Act protects the rights of employees to utilize the Board's processes, including the right to file unfair labor practices).

About a week after Oliver told Sergio that the Company was looking for ways to fire him, Oliver gave Sergio the last of the Company's "double-barreled warning." (A. 146.) The credited evidence shows that shortly after Sergio told Eddie Ochoa, a leadman in the maintenance department, about how Sergio's work troubles were affecting his daughter, Oliver summoned Sergio to the maintenance office using the warehouse intercom system. (A. 146; 65-66.) As Sergio walked into Oliver's office, Ochoa was leaving. Oliver asked Sergio what was wrong, and Sergio recounted the story about his daughter. Oliver, "seiz[ing] the occasion," told Sergio that the solution to his problems at work was to "[s]top complaining to the Labor Board and the Union." (A. 146; 68.) After Sergio responded by saying he only wanted someone to represent him, Oliver flatly stated, "Well, I already gave you the solution." (A. 146; 69.)

In applying the totality of the circumstances standard, the Board found (A. 146) that Oliver's remarks impliedly warned Sergio that his working conditions would not improve until he stopped his protected activity. This remark was made by the same supervisor who told Sergio that selecting the Union would be futile, that benefits would be eliminated if employees were to select the union for bargaining representation, and that the Company was looking for ways to fire him.

Heard in the context of these other threats, Oliver advice to "stop complaining" would reasonably suggest to Sergio that his working conditions would not improve unless, and until, he discontinued his union activities. Thus, considering the totality of the circumstances, the Board properly found that Oliver's instruction to Sergio that he should "stop complaining" reasonably had the tendency to interfere with, restrain, or coerce Sergio in the exercise of his Section 7 rights.

The Company attempts (Br. 31) to bolster its preferred view of the circumstances surrounding Oliver's threats to Sergio by claiming that there was no evidence of union animus. As an initial matter, the Company's interrogation of Edgar and multiple threats against Sergio support the Board's conclusion (A. 146) that the Company "continued to harbor animus toward Sergio's union activity." *See Parsippany Hotel Mgmt. Co.*, 99 F.3d at 423-24 (contemporaneous Section 8(a)(1) violations support inference of animus). In any event, Oliver's motive or animus is irrelevant to the Board's analysis of whether a Section 8(a)(1) violation occurred. *See Exxel/Atmos*, 147 F.3d at 975 (the employer's motive and the actual effect of its statements are irrelevant"); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.2d 733, 747 (4th Cir. 1998) (the Board has long held that "interference, restraint, and coercion under Section 8(a)(1) does not turn on employer motive); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (test is objective coerciveness; employer intent is not part of offense).

Finally, there is no merit to the Company's claim (Br. 31) that Oliver's threats "defy common sense" because it is "inconceivable" that Oliver would threaten Sergio, one of the Union's strongest supporters. Such behavior is entirely consistent with Oliver's stated belief that the employees did not need representation. (A. 144; 113.) Moreover, the Company trained Oliver in the "dos and don'ts of an organizing campaign." (A. 144; 99-102.) As such, it is entirely conceivable that Oliver would deny making such statements, lest the Company learn that he disregarded the training provided to him.

**5. The Company fails to meet its heavy burden in seeking to overturn the Board's credibility determinations**

Similar to its claims regarding the Board's unlawful interrogation finding, the Company again couches its credibility argument (Br. 10-12; 28- 31) as the Board's failure to consider the record as a whole. To be clear, the Company's specific complaint (Br. 30-31) is only that the Board failed to consider Oliver's discredited testimony. The Company again faces a difficult burden in its attack of the Board's decision to credit Sergio over Oliver. As stated previously, this Court has held that "credibility issues . . . are quintessentially the province of the [administrative law judge] and the board." *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988). And this Court "ordinarily defer[s]" to a judge's credibility determination that has been adopted by the Board. *See Quazite*

*Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 498 (D.C. Cir. 1996).

The judge expressly considered Sergio's testimony and found "nothing" in Sergio's demeanor that would cause him to question his truthfulness. (A. 144.) The judge noted that Sergio struck him "as a sincere and humble person" who made "no effort to exaggerate the incidents about which he testified." (A. 144.) Moreover, given that Sergio was a company employee at the time he testified, his testimony is especially worthy of credence. *See Flexsteel Indus.*, 316 NLRB 745, 745 (1995) ("[T]estimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.") *aff'd mem. NLRB v. Flexsteel Indus.*, 83 F.3d 419 (5th Cir. 1996).

In contrast to Sergio's version of events, Oliver provided only a "pat answer" flatly denying that he made any statements to Sergio or that he had any conversations with Sergio. In fact, the judge's decision to credit Sergio over Oliver "rests to a large degree" on the fact that the judge had "almost no confidence in the truthfulness of Oliver's pat answer denying the incidents at issue." (A. 146.) Oliver purportedly avoided Sergio was because he was a pro-union worker, an explanation that, as the judge noted (A. 144), Oliver conveniently repeated when denying assertions made by another pro-union worker. Further, the

judge properly rejected (A. 144) the Company's contention that Oliver should be credited because he had been trained on the "dos and don'ts" of an organizing campaign and was generally well-liked. As the judge explained, such claims were "offset by [Oliver's] hesitation to admit candidly that he did not believe the employees needed representation."[4] (A. 144.) Indeed, as the judge properly concluded, Oliver's conduct, "as described by Sergio," was "consistent with his strongly held belief."

The Court should reject the Company's argument (Br. 11-12) that Sergio's testimony is not credible because he "attempted to impede [the Company's] cross-examination by insisting upon using a Spanish translator." As an initial matter, the judge's reasoned consideration of credibility specifically considered Sergio's English language skills. (A. 144.) *See NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1121 (7th Cir. 1986) (while language barrier complicated hearing process, judge who alone heard testimony and observed demeanor, best suited to assess credibility). Moreover, as the Board has noted, "a witness' difficulties with English should not hastily be equated with unreliability or incompetence."

[4] The Company claims (Br. 30) that the judge applied an "arbitrary double standard in evaluating the evidence" by discrediting Oliver for hesitating to admit he did not want the Union while crediting Edgar despite his reluctance to admit his termination. These determinations involved separate allegations and two separate witnesses and are therefore incomparable. Moreover, Edgar's demeanor provided a strong basis for finding him credible, in contrast to Oliver, who gave only "pat" answers and denials. (A. 144.)

*Daikichi Corp.*, 335 NLRB 622, 623 (2001). *See also Union Nacional de Trabajadores*, 219 NLRB 862 fn. 2 (1975) (the conduct of Board proceedings in English, with the concomitant use of a translator, is not a ground for overturning credibility resolutions).

The Company also contends (Br. 12-14; 28-29) that the judge erred in crediting Sergio's testimony because it was inconsistent with "many witnesses." This argument is without merit. The alleged inconsistencies (Br. 13 n.4) address Sergio's behavior on election day and are therefore irrelevant to the underlying unfair labor practices. Thus the judge could properly credit Sergio's version of events despite any of these asserted inconsistencies because "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *rev'd on other grounds*, 340 U.S. 474 (1951).

Finally, the Company argues (Br. 30) that the Board failed to consider the General Counsel's decision not to recall Alex Martinez, an employee with whom Edgar discussed Oliver's statements. During the hearing, the Union called Martinez to testify as to conversations he had with Javier Oliver, a supervisor at the warehouse. Contrary to the Company's claim, the judge never "stated on the record that he expected Martinez to be recalled." (Br. 30.) Instead, a review of the transcript citations upon which the Company relies to support this assertion shows

that the Union's attorney, and not the judge, is speaking about a matter completely unrelated to recalling Martinez. Moreover, even if Martinez was recalled, his testimony would have had no probative value because Martinez was not present when Oliver threatened Sergio. Thus, the Board properly adopted the judge's decision to credit Sergio despite the General Counsel's decision not to recall Martinez. *See Advocate S. Suburban Hosp. v. NLRB*, 468 F.3d 1038, 1048-49 (7th Cir. 2006) (the Board's decision to credit witness despite absence of a potentially corroborating witness was reasonable where potential witness's testimony would have provided "little value.").

In sum, the Company unlawfully interrogated employee Edgar Acosta and unlawfully threatened employee Sergio Acosta on four separate occasions. This conduct reasonably tended to coerce employees in exercising their Section 7 rights. As a result, the Court should affirm the Board's findings that the Company's conduct violated Section 8(a)(1) of the Act.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

March 2015

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| UNF WEST, INC. | ) | |
| | ) | |
| Petitioner/Cross-Respondent | ) | Nos. 14-1181, 14-1224 |
| | ) | |
| v. | ) | |
| | ) | |
| NATIONAL LABOR RELATIONS BOARD | ) | |
| | ) | Board Case No. |
| Respondent/Cross-Petitioner | ) | 21-CA-79406 |
| | ) | |

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,944 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 30th day of March, 2015

# STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]; . . . .

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the

case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

REGULATIONS RELATING TO LABOR

29 C.F.R. § 102.45 [Title 29, Subtitle B, Chapter I, Part 102, Subpart B, Code of Federal Regulations]

(b) [Administrative law judge’s decision; contents; service; transfer of case to the Board; contents of the record in case] The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, shall constitute the record in the case.